

Opinion No. 03-03

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OPINION OF: PATRICIA A. MADRID, Attorney General

BY: ELIZABETH A. GLENN, Assistant Attorney General

TO: Rhonda G. Faight, Secretary Designate, New Mexico State Highway and Transportation Department, P.O. Box 1149, Santa Fe, New Mexico 87504-1149

QUESTION

Do Indian tribes, pueblos and nations (collectively referred to as "tribes") have authority to impose taxes on contractors performing work for the State of New Mexico on the tribes' reservations?

CONCLUSION

A tribe generally does not have inherent sovereign power to tax state contractors working on a highway project on a right-of-way easement granted to the state under federal law.

FACTS

The question posed by the opinion request arose most recently in connection with a State Highway and Transportation Department ("SHTD") resurfacing project on a portion of I-40 east of the Arizona state line that runs through the Navajo Nation's trust lands. In response to an inquiry by SHTD's general counsel, the Nation has taken the position that it can charge its business activity tax on contractors performing services for the state on the resurfacing project. For purposes of this opinion, we assume that the contractors on which the Nation and other tribes are attempting to impose a tax are not members of the tribes.

ANALYSIS

The principles governing the scope of a tribe's authority to tax nonmember individuals and entities have been developed and applied by the United States Supreme Court in a line of cases beginning with **Montana v. United States**, 450 U.S. 544 (1980). **Montana**, which the Court has described as "the pathmarking case concerning tribal civil authority over nonmembers," **Strate v. A-1 Contractors**, 520 U.S. 438, 445 (1997), held that the Crow Tribe was without authority to regulate hunting and fishing by non-Indians on land owned by non-Indians in fee simple within the reservation.

The **Montana** opinion stated that, absent express congressional delegation, the exercise of inherent tribal power is limited to "what is necessary to protect tribal self-

government or to control internal relations...." 450 U.S. at 564. As a result, "the inherent sovereign powers of an Indian tribe [generally] do not extend to the activities of nonmembers of the tribe." **Id.** at 565. Nevertheless, the opinion continued,

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Id. Additionally, a tribe may "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." **Id.** at 566.

The Supreme Court subsequently applied the principles enunciated in **Montana** in a case involving the Navajo Nation's imposition of a hotel occupancy tax on nonmember guests of a hotel owned and operated by a non-Indian proprietor on non-Indian fee land within the Nation's boundaries. **Atkinson Trading Co. v. Shirley**, 532 U.S. 645, 654 (2001). Under these circumstances, and in the absence of any authorization by Congress "through treaty or statute," **id.** at 654, the Court termed the tax "presumptively invalid," **id.** at 659. This made it "incumbent upon the Navajo Nation to establish the existence of one of **Montana's** exceptions." **Id.**

The Court went on to find the tax was not excepted from the general rule. Specifically, the Court held that tax had no nexus to any contract, commercial dealing or similar consensual relationship between the nonmember hotel owner or guests and the Nation. **Id.** at 654-57. According to the Court, the general availability of the Nation's fire, police and medical services to the hotel and hotel guests was not sufficient to sustain the tax under **Montana's** consensual relationship exception. **Id.** at 655.

Similarly, the Court found that operation of the hotel did not endanger or directly affect the "political integrity, economic security or health and welfare of the tribe" so as to justify the tax under **Montana's** second exception. **See also id.** at 658 ("irrespective of the percentage of non-Indian fee land within a reservation, **Montana's** second exception grants Indian tribes nothing 'beyond what is necessary to protect tribal self-government or to control internal relations'") (quoting **Montana**, 450 U.S. at 564)).

Also pertinent is the Supreme Court's decision in **Strate**, referenced above. That case addressed the jurisdiction of a tribal court in a civil action stemming from an automobile accident occurring on a 6.59-mile stretch of a North Dakota state highway running through the Fort Berthold Indian Reservation, which is held in trust for the Three Affiliated Tribes (Mandan, Hidatsa and Arikara). 520 U.S. at 442-43. The highway was maintained by North Dakota under a federally-granted right-of-way. **Id.** None of the drivers involved in the accident were members of the Tribes.

The Court held that a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. 520 U.S. at 453. Thus, under **Montana**, the civil authority of a tribal court, absent express Congressional authorization, generally does not extend to the activities of nonmembers of the tribe on non-Indian fee lands. **Id.** Ultimately, the Court decided that neither the general rule enunciated in **Montana** nor its two exceptions applied and that the tribal court did not have subject matter jurisdiction in the civil action. **Id.** at 460.

For purposes of this opinion, the significance of the **Strate** decision is the Court's discussion of the state highway within the reservation on which the accident occurred. In contrast to the land involved in **Montana** and the Court's other cases addressing a tribe's authority over nonmember activity, the portion of the state highway at issue in **Strate** was on land held in trust for the Three Affiliated Tribes and their members. 520 U.S. at 454. Nevertheless, after reviewing the characteristics of the right-of-way, the Court concluded that the stretch of highway within the reservation was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." **Id.**

In reaching this conclusion, the Court found the following characteristics important:

1. The United States granted the right-of-way to the North Dakota State Highway Department under a 1948 federal law, codified at 25 U.S.C. §§ 323 -328. Under that law, a grant over tribal trust lands requires "'consent of the proper tribal officials,' § 324, and the payment of just compensation, § 325." 520 U.S. at 454-55. **See also id.** at 456 ("the Tribes have consented to, and received payment for, the State's use of the 6.59-mile stretch for a public highway").
2. The grant provided that the state's easement was "subject to any valid existing right or adverse claim," and was "without limitation as to tenure" as long as it was used for the purposes specified in the grant. **Id.** at 455.
3. Aside from reserving to Indian landowners the right to construct certain crossings of the right-of-way, "the Three Affiliated Tribes expressly reserved no right to exercise dominion or control over the right-of-way." **Id.** The Tribes "retained no gatekeeping right." **Id.** at 456.
4. As "part of the State's highway, the right-of-way is open to the public, and traffic on it is subject to the State's control." **Id.** **See also id.**, n. 11 (acknowledging the authority of tribal police to patrol roads within a reservation, including the state highway, and to deliver to state law enforcement officials nonmembers stopped on the highway for violations of state law).

Under these conditions, the Court stated that the Tribes "cannot assert a landowner's right to occupy and exclude," which, in turn, "'implies the loss of regulatory jurisdiction over the use of the land by others.'" **Id.** at 456 (quoting **South Dakota v. Bourland**, 508 U.S. 679, 689 (1993)).

Whether the Navajo Nation and other tribes in New Mexico may properly tax nonmember contractors working on state highway projects within those tribes' territories depends on the application of the principles described above from the Supreme Court's decisions in **Montana, Atkinson Trading Co.** and **Strate**. Under those decisions, a tribe generally has no inherent sovereign power to tax nonmembers who are working on a state highway project under a contract with the state if the project is located on nonmember fee lands or their equivalent within the reservation and the nonmembers' activities do not significantly involve the tribe. The Supreme Court considers equivalent to nonmember fee lands an easement for a right-of-way granted to a state under federal law, where the tribe has consented to and received compensation for the easement and has not expressly reserved any gatekeeping right or other right to control and regulate the right-of-way. **See also Big Horn County Elec. Coop. v. Adams**, 219 F.3d 944 (9th Cir. 2000) (holding that, after **Strate**, a tribe had no authority to impose its ad valorem tax on the value of a utility's Congressionally-granted right-of-way over reservation land).

In connection with the opinion request, we were provided with several examples of easements on reservations where SHTD's projects are located. Those easements appear to share the same or similar characteristics as the easement involved in **Strate**. They grant rights-of-way for state highway purposes under the same chapter of federal law governing rights-of-way through Indian lands, 25 U.S.C. §§ 311-328, and implementing regulations, 25 C.F.R. § 169. The affected tribe consents to the grant and receives compensation. None of the easements reserve general gatekeeping rights to the tribes. In the more recent grants to SHTD, the tribes expressly retain civil jurisdiction to a greater extent than in the older grants and in the easement involved in **Strate**. **Compare** Jicarilla Easement, P 15 and Pojoaque Easement, P 15 **with** Navajo Easement and **Strate**, 520 U.S. at 455-56 (describing easement at issue in that case). However, even the recent grants are silent regarding the tribes' authority to tax nonmember activity on the rights-of-way, and cede to SHTD the exclusive right to regulate, among other things, highway design, highway construction and highway maintenance.

Accordingly, we believe that under the newer as well as the older easements, the tribes have given up the right to exercise "dominion and control over the rights-of-way," **Strate**, 520 U.S. at 455. As a result, the easements are effectively the same as non-tribal fee lands for purposes of the tribes' civil jurisdiction, leaving the tribes generally without authority to tax or otherwise regulate the activities of nonmember contractors working on state highway projects located on the easements. Our conclusion assumes that, as in **Strate**, no treaty or federal law gives the tribe jurisdiction over the easements and neither of the exceptions to **Montana**'s general rule - consensual relationships or tribal integrity, security and welfare - is applicable.